Opinion by Tilzer, J.

(48 Misc. 2d 544, 265 N.Y.S. 2d 304)

This is an article 78 proceeding instituted by petitioner for an order annulling the determination made by respondent New York City Housing Authority barring and otherwise disqualifying petitioner from future bidding on public contracts for a period of five years. Respondent cross-moves, prior to answer, to dismiss the petition on multiple grounds.

The proceeding stems from the refusal of an alleged former officer of petitioner, George Campbell, Jr., to sign a waiver of immunity when called before a grand jury of New York County, in its investigation to determine whether the crime of bid rigging on public contracts, among others, had occurred in New York County.

The petition alleges that George Campbell, Jr., resigned on March 26, 1965, as an officer or director of petitioner, and on or about that date divested himself of his stockholdings. That since that date, he had been employed as an estimator by petitioner, a position which does not entail any management functions. That thereafter, on April 13, 1965, he was served with a subpoena to appear before the grand jury on April 14, 1965; that he did appear on said date, but refused to sign a waiver of immunity and was not questioned by the grand jury.

Such alleged resignation and divestiture of his stock interest in the corporation by George Campbell, Jr., prior to his refusal to waive immunity, appears to be the basis for this proceeding.

The question for determination is whether the petitioner presents a proper case for an article 78 proceeding. Respondents contend that petitioner has an adequate remedy at law. They rely on Public Authorities Law, section 2601, requiring that a clause shall be inserted in all contracts with any public authority created by the state for work or services performed or to be performed or goods sold or to be sold, that upon the refusal of any person when called to testify before a grand jury concerning any transaction or contract had with the state, public authority, &c., to sign a waiver of immunity, such person, and any firm, partnership or corporation of which he is a member, partner, director or officer, shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority for goods, work or services for a period of five years after such refusal. The provision, mandated by section 2601, is contained in each of respondent's contracts with petitioner, under section 38 of the amendments to the general conditions thereof.

Respondent received a letter from the District Attorney of New York County stating that said George Campbell, Jr., of the petitioner corporation had refused to sign a waiver of immunity before the grand jury. Upon receipt of the district attorney's letter, the authority canceled the painting contracts with petitioner, and disqualified petitioner, as well as said George Campbell, Jr., and any other firm, partnership or corporation of which he is a member, partner, director or officer, from entering into contracts with the authority for a period of five years. Petitioner was so informed by letter of the Authority. This letter states that such action was taken pursuant to section 38

of the General Conditions of the contracts. Thus respondent argues that the disqualification is pursuant to contract with petitioner and if it was erroneous, petitioner's remedy is by way of plenary suit based on the contract.

The fact that section 38 of the General Conditions of the contracts was incorporated therein by reason of the mandate of section 2601 of the Public Authorities Law does not make its provisions any the less a purely contractual matter between the Authority and the petitioner. Here it appears that petitioner has a remedy based upon contracts with respondent.

The scheme of the Public Authorities Law provides not one, but two means by which the penalty of disqualification may be invoked against a recalcitrant contractor refusing to cooperate in a grand jury investigation involving public contracts. Thus, section 2601 provides for the mandatory contract provision whereby both cancellation and disqualification may be applied as a matter of contractual agreement between a public authority and such contractor. Section 2602, on the other hand, provides a purely statutory basis solely for disqualification even if such contractual provision were non-existent.

The court is not persuaded that this is a proper case for a proceeding under article 78. It is available only in those situations where there are no other remedies and the conditions surrounding its use are not found in the ordinary plenary suit (Matter of Wilson v. Board of Education, &c., 276 App. Div. 482).

Accordingly, the application is denied and the cross-motion is granted dismissing the petition without prejudice to a plenary suit. Settle judgment.

Opinion of Schweitzer, J.

(N.Y.L.J. March 8, 1966)

Plaintiff-painting contractor instituted this action for a permanent injunction of the enforcement by defendant the New York City Housing Authority of the disqualification and barring of plaintiff from bidding on public contracts with the aforesaid authority for a period of five years. At this initial stage of the lawsuit, plaintiff applies for a preliminary injunction which would, during the interim trial period, afford plaintiff the same relief as the ultimate remedy sought. Defendant has cross-moved for an order dismissing the complaint upon, amongst other bases, the ground that another action is pending between the same parties for the same cause of action (CPLR 3211 [a] 4). An article 78 proceeding had been instituted by plaintiff in the instant action for an order annulling the subject determination by the New York City Housing Authority, and examination by both pleadings lends support to the contention by defendant. The application was denied and the petition dismissed without prejudice to a plenary suit as the court was convinced that an article 78 proceeding was not appropriate. At present, an appeal is pending from this judgment of dismissal. Logic and the rationale of fairness underlying CPLR 3211(a)4 require that, under the present circumstances, we adopt the view that "* * * an action in which a judgment has been rendered is deemed to continue to exist pending an appeal * * *" (Apelbaum v. Apelbaum, 16 Misc. 2d 636, 638; see 4 Weinstein-Korn-Miller, New York Civil Practice, pars. 3211.25-3211.21). Accordingly, defendant's cross-motion is granted in so far as it has been interposed pursuant to

CPLR 3211(a)4 and only to the extent of staying the instant action pending final determination after appeal or termination, in any fashion, of the aforesaid appeal or termination, in any fashion, of the aforesaid 78 proceeding. Within the context of the foregoing disposition, the application by plaintiff and the remainder of the relief requested in the cross-motion are, consonant with the foregoing, not considered, and leave is granted to renew at any appropriate time. Settle order.

Opinion of the Appellate Division

275 N.Y.S. 2d 363 (not officially reported)

Order and judgment (one paper) unanimously affirmed, with $50 costs and disbursements to the respondents. No opinion. Order filed.

Opinion of the Appellate Division

26 A.D.2d 365, 275 N.Y.S. 2d 365

Order, entered on March 21, 1966, granting defendants' cross-motion to dismiss the complaint pursuant to CPLR 3211(a) to the extent only of staying the action for a permanent injunction, pending a final determination of the article 78 proceeding instituted by plaintiff in this action against defendants in this action, unanimously modified on the law and on the facts, with $50 costs and disbursements to defendants-respondents-appellants and complaint dismissed. The complaint is insufficient because plaintiff is subject to the contractual agreements it made and because on the present allegations plaintiff does not establish a case for equitable relief. Order filed.

Opinion of Court of Appeals, State of New York

20 N. Y. 2d ——

STATE OF NEW YORK

COURT OF APPEALS

[SAME TITLE]

PER CURIAM:

This is an action to nullify a determination of the New York City Housing Authority disqualifying the appellant corporation from bidding on future contracts with the Authority. In addition the appellant seeks an injunction against the Authority's enforcement of its decision. The disqualification is mandated by the Public Authorities Law §2601 since the appellant's former president appeared before a grand jury investigation bid-rigging and refused to sign a waiver of immunity.

We hold that section 2601 of the Public Authorities Law is constitutional (*Matter of Gardner v. Broderick*, 20 N Y 2d 227, decided herewith) and that the disqualification imposed on the appellant corporation is valid. The fact that the appellant's officer resigned his position and that the resignation was accepted prior to his appearance before the grand jury and his refusal to sign a waiver of immunity is not controlling. Where the termination of the relationship of the individual officer with the corporation occurs almost contemporaneously with his refusal to sign a waiver of immunity or where it is obvious that the resignation was tendered and accepted solely for the purpose

of avoiding the statutory disqualification, the person so resigning or otherwise departing shall be deemed to have acted in his capacity as a corporate officer when he refused to sign the waiver.

There may be times when the statute will operate to penalize a corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative. The Legislature has, however, recognized this problem and has specified a procedure by which the disqualification can be removed under such circumstances. (Public Authorities Law §2603) The appellant's exclusive remedy is the procedure outlined in that statute.

The orders of the Appellate Division should be affirmed with costs.

* * *

Order affirmed, with costs. Opinion Per Curiam. All concur except Breitel, J., taking no part.

STATE OF NEW YORK

COURT OF APPEALS

No. 181.

In the Matter of

the Application of Robert Vincent Gardner,

Appellant,

For an Order &c.

vs.

Vincent L. Broderick, as Police Commissioner of the City of New York, & ano.,

Respondents.

FULD, Ch. J.:

In this article 78 proceeding, the petitioner seeks reinstatement as a patrolman in the New York City Police Department, claiming that he was dismissed solely for refusing to waive his privilege against self-incrimination and that it was unconstitutional for the Police Commissioner to discharge him on that ground. In August of 1965, a New York County Grand Jury was investigating accusations of bribery and corruption of police officers in connection with illicit gambling operations. The petitioner, then under departmental charges, was subpoenaed to appear before the grand jury. After being advised of the investigation and that the grand jury desired to question him concerning the performance of his official duties, he was requested to

sign a limited waiver of immunity—"to waive immunity from prosecution" for any misconduct in office disclosed by his testimony—as provided in section 1123 of the New York City Charter. (See, also, N. Y. Const., art. I, §6.)[1] The petitioner was also informed that, under both the Charter and the Constitution, he was required to sign the waiver and that, if he refused to do so, he would be discharged from his position as a police officer. He refused to execute the waiver and, following an administrative hearing, was dismissed from the force.

It is clear, and was so understood by the petitioner, that section 1123 of the Charter required him, as a condition of his continued employment by the police department, to waive his constitutional privilege against self-incrimination and to answer questions regarding the conduct of his office and the performance of his official duties. Such provisions have been upheld in the past (see, e.g., *Nelson v. Los Angeles County*, 362 U. S. 1) and, although the Supreme Court has indicated that the question may still be an open one

1. Section 1123 of the City Charter provides, in part, that, if any employee of the City "shall * * * wilfully refuse or fail to appear before * * * any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding * * * official conduct of any officer or employee of the city or of any * * * county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant."

And section 6 of article I of the State Constitution declares, insofar as relevant, that "No person shall * * * be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his * * * office * * * or the performance of his official duties * * *, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, * * * be removed from his * * * office by the appropriate authority."

(see *Spevack* v. *Klein*, 385 U. S. 511, 516, n. 3; *Stevens* v. *Marks*, 383 U. S. 234, 243), we find no constitutional defect in the statute as it applies to this petitioner.

In *Garrity* v. *New Jersey* (385 U. S. 493), the Supreme Court, deciding that the government may not use "the threat of discharge to secure incriminating evidence" against a public employee, held that a police officer could not be compelled to waive his constitutional privilege against self-incrimination by threats that he would otherwise be removed from office. The testimony obtained under such circumstances was ruled to be inadmissible in subsequent criminal proceedings brought against him. This decision undoubtedly had the effect of partially invalidating section 1123 of the New York City Charter as well as section 6 of article I of the New York Constitution. But nothing decided in the *Garrity* case bears on the issue in the present case. If the petitioner before us had executed the waiver required by section 1123 and then testified about misconduct in office, his testimony, though inadmissible in a criminal prosecution, would, nevertheless, have furnished sufficient cause to justify his dismissal from the police force. (Cf. *Ullman* v. *United States*, 350 U. S. 422, 430-431.)

In point of fact, the petitioner did not execute the waiver and stood on his constitutional privilege against self-incrimination when notified that he was to be questioned about malfeasance as a police officer. Such information patently bore upon his fitness to remain in office, information which the public had a right to know and the petitioner was under a duty to reveal. His refusal to speak on the subject constituted "employee insubordination for failure to give information which * * * the State has a legitimate interest in securing" (*Nelson* v. *Los Angeles County*, 362

U. S. 1, 7, *supra;* see *Spevack* v. *Klein,* 385 U. S. 511, 519, *supra* [*per* Fortas, J., concurring]), and, consequently, he was properly dismissed from the police force. (See *Canteline* v. *McClellan,* 282 N. Y. 166; *Christal* v. *Police Com. of San Francisco,* 33 Cal. App. 2d 564; *Cunningham* v. *Civil Service Com'n,* 48 Hawaii 278; *Fallon* v. *New Orleans Police Department,* 238 La. 531; *Souder* v. *Philadelphia,* 305 Pa. 1). Although people in public office and on the public payroll may not be compelled to surrender their constitutional privilege against self-incrimination (see *Garrity* v. *New Jersey,* 385 U. S. 493, *supra*), they have no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties.

In *Spevack* v. *Klein* (385 U. S. 511, *supra*), the Supreme Court held that an attorney could not be compelled, upon pain of disbarment, to waive his privilege against self-incrimination and testify about his professional conduct. (See, also, *Matter of Cohen,* 7 N Y 2d 488, 498 [dissenting opinion].) However, a lawyer, though licensed by the State—like a doctor, barber or chauffeur—is not, as Mr. Justice Fortas pointed out in his concurring opinion in the *Spevack* case (385 U. S., at p. 520), "an employee of the State. He does not have the responsibility of an employee to account to the State for his actions." The petitioner, however, did have such a responsibility and his refusal to carry out that responsibility rendered him subject to removal from his position of public trust and confidence.

The order appealed from should be affirmed, without costs.

Order affirmed, without costs. Opinion by Fuld, Ch. J. All concur.

New York State Public Authorities Law

"2601 *Ground for Cancellation of Contract by Public Authority*

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) Such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by

the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.''

''2602 *Disqualification to Contract with Public Authority*

Any person who, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the superintendent of public works of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a mem-

ber, partner, director or officer, is known to have a contract."

"2603 *Removal of Disqualification of Public Contractors by Petition*

1. Any firm, partnership or corporation which has become subject to the cancellation or termination of a contract or disqualification to contract on account of the refusal of a member, partner, director or officer thereof to waive immunity when called to testify, as provided in sections twenty-six hundred one and twenty-six hundred two of this title, may, upon ten days' notice to the attorney general and to the officer who conducted the investigation before the grand jury in which the refusal occurred, commence a special proceeding at a special term of the supreme court held within the judicial district in which the refusal occurred for a judgment discontinuing the disqualification. Such application shall be in the form of a petition setting forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification, as provided in sections twenty-six hundred one and twenty-six hundred two of this title.

A copy of the petition and accompanying papers shall be served with the notices to be given pursuant to this subdivision.

2. Upon the filing of such petition the court may stay as to petitioner, pending a decision upon the petition, the cancellation or termination of any contracts resulting from such refusal upon such terms as to notice or otherwise as may be just.

3. At least two days prior to the return day, the officer who conducted the investigation before the grand jury and the attorney general may file answers to the petition or apply for judgment dismissing the petition as a matter of law. On or before the return day the petitioner may file a reply to the answer.

4. Upon the return day the court may, upon the petition and answer and other papers filed, forthwith render such judgment as the case requires, or if a triable issue of fact is duly raised, it shall forthwith be tried before a court sitting without a jury or before a referee. The provisions of statute or rule governing references in an action shall apply to a reference under this subdivision.

5. The court shall render judgment dismissing the petition on the merits or discontinuing the disqualification upon the ground that the public interest would be served by its discontinuance, and granting such other relief as to the cancellation or termination of contracts as may be appropriate, but without costs to petitioner."